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Supreme Court, U.S.
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No. 92-

In the Supreme Court of the United States.

October Term, 1992

JOSEPH J. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTE at WALPOLE, et al.,
Petitioner,

v.

DENNIS J. DOMEGAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for The First Circuit

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QUESTION PRESENTED

Whether the First Circuit erred in awarding attorney's fees pursuant to 42 U.S.C. § 1988, to a civil rights plaintiff whose only recovery was a nominal damage award of one dollar, in contrast to the decision of the Fifth Circuit in Estate of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991), cert. granted sub nom., Farrar v. Hobby, 112 S.Ct. 1159 (1992), the relevant precedents of this Court, and the congressional purpose behind the fee statute.

PARTIES TO THE PROCEEDING

The petitioners are Joseph J. Ponte, Superintendent of the Massachusetts Correctional Institution at Walpole ("MCI-Walpole"), Frank Leppert, Administrator of the Department Segregation Unit ("DSU") at MCI-Walpole, and Peter Gallagher, Acting DSU Administrator during the period relevant to this case.

The respondent is Dennis J. Domegan.

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SUPREME COURT OF THE UNITED STATES

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SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTE at WALPOLE,
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Petitioners,

v.

DENNIS J. DOMEGAN,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Joseph J. Ponte, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered on August 10, 1992, in this case. The petitioners further request that the Court hold this petition, and order summary disposition on the merits following its pending decision in Estate of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991), cert. granted sub nom., Farrar v. Hobby, 112 S.Ct. 1159 (1992). Supreme Court Rule 16.1.

OPINIONS BELOW

The opinion of the Court of Appeals (Cyr, J.) on the issue of attorney's fees is reported at 972 F.2d 401 (1st Cir. 1992), and is reprinted in the

appendix hereto, at pages 1a-125a. The opinion of the concurring justice (Campbell, J.) is reported at 972 F.2d at 425, and is reprinted in the appendix at page 126a. The Memorandum and Order of the District Court (Zobel, J.) on the issue of attorney's fees is unreported, and is reprinted in the appendix at pages 127a-133a. The earlier opinion of the Court of Appeals on the issue of qualified immunity is reported as Domegan v. Fair, 859 F.2d 1059 (1st Cir. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered August 10, 1992. App. 3a. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988(b). Attorney's fees.

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On or about August 15, 1983, the respondent Dennis J. Domegan ("the Respondent" or "Domegan"), filed a pro se complaint in the District Court for the District of Massachusetts, based on Domegan's placement in the Alternate Feeding Program ("AFP") at MCI-Walpole for two periods, in May and July of 1983. Appendix ("App.") 5a. The first placement occurred because Domegan threw

his food tray and human waste against the wall outside his cell. Id. at n.1. The second placement also occurred because Domegan threw his food and tray outside his cell. Id. Jurisdiction in the District Court was under 28 U.S.C. §§ 1331 and 1343.

At the time the action was filed, prisoners in the AFP received meals of two cheese sandwiches, with water from the inmate's cell, served behind the closed solid steel door of the inmate's cell. App. 6a. No pre-placement process was offered to the inmate, and AFP status was reviewed every fifth day. Id.

On November 1, 1983, the AFP was substantially revised to provide a more varied and nutritious menu. App. 8a n.3.

In 1985, the AFP was revised to provide for post-placement review after every meal. Id.

In March 1984, the District Court appointed Goodwin, Procter & Hoar as counsel for the respondent. App. 6a. The third and final amended complaint filed by Domegan alleged claims of: cruel and unusual punishment (Eighth and Fourteenth Amendments; 42 U.S.C. § 1983; Mass. Gen. L. ch. 12, §§ 11H, 11I); violation of due process (Fourteenth Amendment; 42 U.S.C. § 1983; Mass. Gen. L. ch. 12, §§ 11H, 11I) and violation of the Massachusetts Civil Rights Act (Mass. Gen. L. ch. 12, § 11I). App. 6a-7a. The third amended complaint sought declaratory and injunctive relief, compensatory damages totaling

$50,000, and punitive damages totaling $350,000 ($35,000 from each of ten defendants). App. 7a-8a.

On cross-motions for summary judgment, the District Court entered judgment in favor of Domegan on his procedural due process claim, but denied the motions in all other respects. App. 8a-9a. The defendants' filed an interlocutory appeal from the denial of their motion for summary judgment on grounds of qualified immunity. The First Circuit affirmed the District Court's refusal to grant summary judgment on such grounds. Domegan v. Fair, 859 F.2d 1059 (1st Cir. 1989).

While the interlocutory appeal was pending, Domegan was released from custody on October 11, 1988. App. 8a

n.3. Thus, he did not pursue his claims for injunctive and declaratory relief. Id. The case proceeded to trial on the remaining claims for damages in March 1989. Id. The jury awarded Domegan $1.00 in "compensatory" damages against the three petitioners on the procedural due process claim, and returned verdicts in favor of all of the defendants on each of the respondent's remaining claims. App. 9a.

Domegan petitioned the District Court for an award of attorney's fees and costs in the amount of $88,655.16, pursuant to 42 U.S.C. § 1988. Id. Though the District Court determined that Domegan was entitled to an award of attorney's fees, it reduced the requested amount to $41,441.55.

App. 133a. On appeal, the First Circuit upheld the awarding of fees, but further reduced the amount to $37,123.85. App. 125a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS DISAGREE AS TO WHETHER A PARTY WHO RECEIVES ONLY A NOMINAL DAMAGE AWARD OF ONE DOLLAR IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

In ruling that attorney's fees are available under 42 U.S.C. § 1988, to a party whose only recovery in a civil rights case is a nominal damage award of one dollar, the Court of Appeals took sides in an already-existing split among the circuits. See App. 32a-35a & n.11. Particularly, in Estate of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991),

cert. granted sub nom. Farrar v. Hobby, 112 S.Ct. 1159 (1992), the Fifth Circuit held that the plaintiffs in that case, who received a nominal damage award of one dollar on their civil rights claims, were not "prevailing parties" for purposes of 42 U.S.C. § 1988, and therefore were not entitled to an award of attorney's fees.

Farrar is not distinguishable from the instant case in any significant way relevant to the issue of attorney's fees. The Farrars filed suit against various Texas officials under 42 U.S.C. §§ 1983 and 1985, seeking both injunctive relief and monetary damages for violation of their civil rights. 941 F.2d at 1312. As in the instant case, the claim for equitable relief was

abandoned during the litigation, and the case went to the jury on only the plaintiffs' claims for damages. Id.

The jury found that one of the defendants "'committed an act or acts under color of state law that deprived Plaintiff Joseph Farrar of a civil right,' and that [the defendant's] acts were not the proximate cause of any injury." Id. at 1312-13. On appeal, however, the Fifth Circuit remanded for entry of a nominal damage award for the civil rights violation, relying on Carey v. Piphus, 435 U.S. 247 (1978).[1/]

1/ The First Circuit relied heavily on Carey in its decision to award attorney's fees in the instant case. App. 28a-29a n.10, 65a-67a & n.23, 78a-85a.

The Farrars also filed an application for attorney's fees under 42 U.S.C. § 1988, which was approved by the District Court in an amount approximating $300,000. 941 F.2d at 1313. Applying this Court's decisions in Texas State Teachers v. Garland Independent School District, 489 U.S. 782 (1989), Rhodes v. Stewart, 488 U.S. 1 (1988), and Hewitt v. Helms, 482 U.S. 755 (1987), the Fifth Circuit reversed, holding that the Farrars were not "prevailing parties" for purposes of 42 U.S.C. § 1988. 941 F.2d at 1313.

At various points in its opinion in the instant case, the First Circuit expressly recognized the conflict between its decision and that of the Fifth Circuit in Farrar. See App. 43a

("With respect, and recognizing the closeness of the question, we would ascribe a somewhat different intendment to the principles enunciated in Hewitt and applied in Rhodes . . ."); App. 80a ("Respectfully, we are unable to agree that a bona fide civil rights action converts to a mere 'damage suit' simply by an adjustment to the ad damnum . . ."). Additionally, the concurring justice noted that the difficult question presented by this case would presumably be "definitively" resolved by this Court's decision following its grant of certiorari in Farrar. App. 126a.

In its opinion, the First Circuit went to great lengths to reiterate the Fifth Circuit's characterization of

Farrar as a case solely about damages. App. 33a n.11, 78a-80a. However, the Court of Appeals did not, and indeed could not, point to any substantive distinction between the instant case and Farrar, beyond such labeling. Like the instant case, Farrar included an initial claim for equitable relief in addition to the claims for damages, but, as in the present case, the claim for equitable relief was abandoned during the course of the litigation. 941 F.2d at 1312.

The claims for equitable relief in this case were properly abandoned when Domegan was released from custody on October 11, 1988. App. 8a n.3. Because Domegan brought the action on behalf of himself only, not on behalf of

a class, no equitable relief could be afforded after Domegan's release. Compare Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970). Also, significantly, by the time this case went to the jury, the AFP had been changed to the point that it "bore little resemblance to the original." Domegan v. Fair, 859 F.2d at 1062 n.3.[2/] Therefore, even if the claims for equitable relief were not moot, it is unlikely that Domegan would have been afforded such relief based on his original claims.

2/ Domegan has never asserted that the changes were occasioned by his suit. App. 46a n.15.

Thus, as in Farrar, by the time this case went to the jury, all that was left to consider were Domegan's claims for damages for alleged past violations of his civil rights. Similarly, no distinction can be drawn based on the fact that in this case, the District Court found a constitutional violation, whereas in Farrar, it is not clear what civil right the jury found to have been violated. 941 F.2d 1312-1313. The Fifth Circuit treated the jury's finding as a finding of a constitutional violation for purposes of awarding attorney's fees. Id. at 1315.

Thus, the decision in this case directly conflicts with that of the Fifth Circuit in Farrar. The Court should grant a writ of certiorari in

this case in order to allow it to achieve uniformity among the circuits, consistent with whatever decision this Court issues in Farrar.

II. THE QUESTION PRESENTED BY THIS CASE IS OF GREAT PUBLIC IMPORTANCE.

This Court has already noted the significance of the issue presented by this case by granting a writ of certiorari in Farrar. Moreover, the Court expressly noted in Garland "the importance of the definition of the term 'prevailing party' to the application of § 1988 and other federal fee shifting statutes[.]" 489 U.S. at 784. The fact that a split has arisen among the circuits in the wake of Garland regarding whether a plaintiff who receives a nominal damage award is a

"prevailing party," App. 32a-35a & n.11, indicates that further elucidation of the issue by this Court is needed.

The First Circuit's opinion amply notes the importance of the availability of attorney's fees to enforcement of our country's civil rights laws. App. 68a. Also of great importance, however, is the impact of such fee awards on public entities and public officials. As is indicated by the circumstances of both this case and Farrar, the defendants in cases where attorney's fees are claimed under 42 U.S.C. § 1988, tend to be public officials. See also H. R. Rep. No. 94-1558, p. 7 (1976). Because state entities generally are not liable for damages under the federal laws to which § 1988 applies, Ngiraingas v. Sanchez,

495 U.S. 182 (1990); Will v. Michigan Department of State Police, 491 U.S. 58 (1989), potentially large awards of attorneys fees under § 1988,[3/] for the most part, must be paid from the personal assets or insurance of public officials. The availability of large fee awards in cases where plaintiffs have suffered only nominal damages may cause timidity in the execution of the duties of public officials and will make it more difficult to attract able and qualified individuals into public

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3/ As mentioned above, the fee award in Farrar was in the range of $300,000. 941 F.2d at 1313.

service. Compare Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

In order to alleviate the above-described problem, States such as Massachusetts have enacted statutes providing for indemnification of public officers. See Mass. Gen. L. ch. 258, § 9. When such statutes apply, and in cases involving municipalities, which do not share States' Eleventh Amendment immunity, the public fisc will bear the brunt of awards of attorney's fees in nominal damage cases. Given the increasingly tight financial circumstances of state and local governments, the public importance of the question presented by this case looms large. For these reasons as well,

the Court should grant a writ of certiorari in this case.

III. THE FIRST CIRCUIT ERRONEOUSLY APPLIED THIS COURT'S PRECEDENTS IN AWARDING ATTORNEY'S FEES BASED ON A NOMINAL DAMAGE AWARD OF ONE DOLLAR.

The First Circuit properly noted that under this Court's decision in Garland, in order to be a "prevailing party" for purposes of receiving an award of attorneys fees under § 1988, a plaintiff must have "(i) obtained relief on a significant claim in litigation, (ii) effecting a material alteration in the parties' legal relationship, (iii) that is not merely technical or de minimus in nature." App. 64a, citing Garland, 492 U.S. at 791-93 (emphasis omitted). Petitioners do not dispute that Domegan obtained some, albeit

nominal, relief, or that his procedural due process claim was "significant." The Court of Appeals' wrongly concluded, however, that the one dollar damage award in this case effected a material alteration in the parties' legal relationship, and that the judgment was more than a technical or de minimus victory.

A. The One Dollar Damage Award Did Not Effect A Material Alteration In The Parties' Relationship As Defined By This Court In Garland.

Noting in Garland the requirement that in order to recover attorney's fees a plaintiff "must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant[,]" this Court cited

its previous opinions in Hewitt, 482 U.S. at 760-61 and Rhodes, 488 U.S. at 3-4. Garland, 489 U.S. at 792. The First Circuit's decision in this case, however, fails to properly follow the decisions in Hewitt and Rhodes.

In Hewitt, the Third Circuit found that the plaintiff's due process rights had been violated by his conviction on prison disciplinary charges based solely on hearsay evidence. 482 U.S. at 758, citing Helms v. Hewitt, 655 F.2d 487, 502 (3rd Cir. 1981) (Helms I). On remand, however, the District Court did not enter judgment in favor of the plaintiff because it ruled that the defendants were entitled to qualified immunity. 482 U.S. at 758. This Court ruled that in such circumstances, the

plaintiff was not a prevailing party for purposes of § 1988 attorney's fees with respect to his due process claim. 482 U.S. at 759-60.

The Court noted that the bare determination that the plaintiff's rights had been violated, in the absence of any redress to the plaintiff, could not be considered prevailing for purposes of § 1988. 482 U.S. at 760, 762. "In all civil litigation, the judicial decree is not the end but the means. . . . The real value of the judicial pronouncement . . . is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff." 482 U.S. at 761 (emphasis in original).

In this case, the District Court's determination that Domegan's procedural due process rights were violated, coupled with only the award of a single dollar in damages, cannot be said to have affected the petitioners' behavior towards Domegan in any significant way, as a judgment granting declaratory or injunctive relief, or an award of money damages of a more than negligible amount, would have. Therefore, under this Court's reasoning in Hewitt, Domegan was not a prevailing party for purposes of an award of attorney's fees. The First Circuit's attempt to distinguish Hewitt was erroneous. See App. 36a-44a.

The First Circuit also failed to properly follow this Court's decision in

Rhodes. App. 45a-47a. In Rhodes, a declaratory judgment entered to the effect that the defendant had violated the plaintiffs' constitutional rights by refusing them permission to subscribe to a magazine. 488 U.S. at 2. However, prior to entry of judgment, one of the two plaintiffs died, and the other was released from state custody. Id. at 3. Thus, even though judgment entered in favor of the plaintiffs, the defendants' behavior towards the plaintiffs would not be affected in the circumstances of the case. Id. at 4. Therefore, following its reasoning in Hewitt, this Court held that the plaintiffs would not be considered prevailing parties for purposes of § 1988. Id.

As in Rhodes, Domegan's release from prison prior to the entry of judgment (as well as the change in policy) ensured that the judgment in this case would have no affect on the Petitioners' behavior towards him. Since, as pointed out above, the mere award of one dollar cannot be considered to have materially altered the parties' relationship in this case, the First Circuit erroneously determined that the plaintiff was entitled to an award of attorney's fees.

B. Even If The One Dollar Damage Award Changed The Legal Relationship Between The Parties, The Change Was Too Insignificant To Support Prevailing Party Status.

Even if the "absolute limitation" discussed above was satisfied in this

case, this Court noted in Garland that "a technical victory may be so insignificant, and may be so near the situations addressed in Hewitt and Rhodes, as to be insufficient to support prevailing party status." 489 U.S. at 792. Because, as argued above, this case falls squarely within the situations addressed in Hewitt and Rhodes, it was erroneous for the First Circuit to award attorney's fees for this reason as well.

The Court in Garland offered a number of additional examples of when technical or de minimus success on a legal claim would not warrant prevailing party status. 489 U.S. at 792. One such example is the case of New York City Unemployed and Welfare Council v.

Brezenoff, 742 F.2d 718 (2nd Cir. 1984) (Brezenoff II). The plaintiff in that case alleged that four regulations of the New York City Human Resources Administration which limited organizing activities in the City's Income Maintenance Centers, violated its members' constitutional rights. New York City Unemployed and Welfare Council v. Brezenoff, 677 F.2d 232, 234 (2nd Cir. 1982) (Brezenoff I). However, only a minor provision of one of the four regulations was held to be invalid. Id. at 235 n.4.

In the passage of Brezenoff II cited by this Court, the Second Circuit affirmed the District Court's denial of an award of attorney's fees on grounds that the relief obtained was de minimis

in comparison to the relief sought by the plaintiff. 742 F.2d at 724 n.4. Similarly, a comparison of the one dollar damage award in this case to the relief sought by Domegan, see supra at 6-7, indicates that Domegan failed to cross the de minimus threshold that would entitle him to an award of attorney's fees. The First Circuit's decision was erroneous for this reason as well.[4/]

4/ The Court of Appeals refused to compare the meager relief granted to Domegan with the relief he sought in this case for purposes of determining whether he was a prevailing party, taking the position that "degree of success" may only be considered for purposes of determining the amount of a fee award rather than its availability. App. 62a-64a. However, this Court's citation to the particular passage in Brezenoff II makes clear that the relief granted must exceed some minimal threshold in relation to the relief

(footnote continued)

C. The Court Of Appeals' Decision Is Inconsistent With Congress's Intent In Enacting 42 U.S.C. § 1988.

This Court stated in Garland, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 782. The Court has

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(footnote continued)

sought, in order for a plaintiff to be a prevailing party. After that de minimus level is exceeded, then the degree of success can be considered for purposes of determining the amount of the fee. The First Circuit's attempt to explain away this Court's citation to the particular passage in Brezenoff II is wholly unconvincing. App. 57a n.19.

previously described Congress's intent in passing the fee statute as replicating the fee provisions of the 1964 Civil Rights Act, and related legislation. See Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983).

At the time Congress enacted § 1988, this Court had issued two opinions discussing the fee provisions of the 1964 Act, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) and Northcross v. Memphis Board of Education, 412 U.S. 427 (1973). Those opinions are cited approvingly in the legislative history, as examples of proper applications of the award of fees in civil rights cases. H. R. Rep. No. 94-1558, p. 6. S. Rep. No. 94-1011, p. 4.

Both Newman and Northcross addressed situations where the plaintiffs served as "private attorneys general," enforcing statutory provisions in a manner that would have impact well beyond the circumstances of the individual plaintiffs. See Newman, 390 U.S. at 402; Northcross, 412 U.S. at 428.[5/] In such circumstances, awards of attorneys fees served the congressional purpose of promoting private enforcement of our nation's civil rights laws. H. R. Rep. No. 94-1558, p. 1. S. Rep. 94-559, p. 4.

5/ Both Newman and Northcross involved claims for injunctive relief. H. R. Rep. 94-1558, p. 9.

However, in cases where neither policies of general application nor parties beyond the individual plaintiffs are likely to be effected, the interests implicated are more analogous to the typical private lawsuit where a party seeks redress for personal injuries suffered at the hands of another. See Hensley v. Eckerhart, 461 U.S. at 444-45 n.4 (Brennan, J., dissenting). In such circumstances, where the award of damages is negligible, the congressional purpose is not served by a fee award.

The instant case plainly falls within the latter category. Given that the relevant policy had long been changed, the potential for impact of Domegan's judgment on others beyond himself was nil. Rather, Domegan's case

was purely an effort to seek damages for alleged past injuries suffered at the hands of the defendants. In such circumstances, it is perfectly appropriate to view success in terms of the degree of monetary relief obtained. See Riverside v. Rivera, 477 U.S. 561, 595 (1986) (Rehnquist, J., dissenting) ("this case shares none of the special aspects of certain civil rights litigation which . . . would justify an award of attorney's fees totally divorced from the amount of damages awarded by the jury."). The congressional purpose behind § 1988 would not be advanced by an award of attorneys fees in the circumstances of this case.

CONCLUSION

For the reasons stated in this petition, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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